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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

RUTH KERR JAKOBY,
Petitioner

v

UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Six Year Statute of Limitations of the Federal Court of Claim's Tucker Act, 28 U.S.C. 1491 is an unconstitutional jurisdictional requirement for"TakingCauses of Action" and should not be used for purposes of Summary Judgment against a Plaintiff, as it effectuates a denial of Plaintiff's Seventh Amendment Right to a fair trial, as well as her Fifth Amendment Right to just compensation, because the phrase "nor shall private property be taken for public use without just compensation "is an independent and equal clause in the Fifth Amendment and stands alone unqualified as to the time or duration of the "Taking" and the filing of the Complaint.

Whether a videotaped interview of petitioner's expert witness who had made a sworn affidavit as to his testimony prior to the video tape interview, but the video tape interview was not under oath or penalty of perjury should have been used in support of petitioner's opposition to Government's motion for summary judgment as to material factual issues in dispute as to danger from 36 hidden, active land-mines or the testing of other military ordinance or weapons of mass destruction even though the videotape itself was not admissible as evidence. **RCFC, App H. Rule 56 (f), 28 U.S.C.A.**

Whether to toll statute of limitations applicable to action against the United States Government, a pro se plaintiff must demonstrate that Government has concealed its acts, when the Government should have a duty to disclose its acts and only the Government knows of its acts with the result that plaintiff was unaware of their existence or that injury was inherently unknowable at accrual date and summary judgment denied plaintiff right to cross examine Government witness as to danger from hidden active land-mines that Government initially denied but later admitted the land-mine presence, when confronted with hearsay inadmissible evidence.

QUESTIONS PRESENTED FOR REVIEW

Whether landowner's claim that the possibility of unexploded land-mines on military's testing facility in off-road location resulted in constructive denial of all access to her property as off-road travel was necessitated by a lack of road to her property located on military testing facility and 36 active land-mines were placed by the military in an area that plaintiff had to travel over off-road to reach her Chrysocolla deposit and this event accrued in March 1991 within the six year statute of limitations following the filing of plaintiff's cause of action April 22, 1996 in the Federal Court of Claims and was a "taking".

Whether pro se landowner's Sixth Amendment Right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defence" should also apply in a Civil "Takings Case" against the Government and summary judgment denied Plaintiff 's right to cross examine adverse Government witness whose affidavit stated there was no danger from the land-mines or impairment of access.

Whether pro se landowners Seventh Amendment Right " in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" was denied by the granting of the Government's Motion for Summary Judgment as well as landowner's Fifth Amendment Right to Just Compensation for the taking of her mineral rights.

Whether the Court's denial of joinder of owner's of the Copper Chief mine and discovery as to what other owner's had been paid for their mineral rights denied property owner her Four-teenth Amendment Rights to equal protection of the laws.

LIST OF PARTIES
TO THE PROCEEDINGS
IN THE COURT BELOW

Ruth Kerr Jakoby, M.D.,F.A.C.S.,J.D. is petitioner and part owner of the Copper Chief Mine. Judge Bruggink of the Federal Court of Claims found it unnecessary to join other owners of the Copper Chief Mine in this "Takings" action in violation of petitioner's Fifth amendment right to just compensation for the Yuma Proving Ground surrounding the Copper Chief Mine. Ruth Kerr Jakoby, Pro Se,2610 Blaine Drive, Chevy Chase,Md., 20815 (301)589-0643 is the only petitioner, although she gave one -third of her one-half interest in the Copper Chief mine to Northern Virginia law School 4105 Duke Street, Alexandria, Va. 22304 (703) 468-8971.

Respondents for the United States are Lois J. Schiffer, Assistant Attorney General Environment &Natural Resources Division; Martin W. Matzen, Lewis S. Wiener, J. Carol Williams, Attorneys Environment & Natural Resources Division .P.O.Box 23795, L'Enfant Station, Washington D.C.20026 (202) 514-5313
Of Counsel: Anne C. Gamson U.S. Army Corps of Engineers, Phoenix, Arizona 85012

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OPINIONS BELOW

The February 18, 1998 Judgment Order of the United States Court of Appeals For The Federal Circuit, whose judgment herein is sought to be reviewed, is at No. 97-5108, is unpublished and is reprinted in the Appendix to this Petition at pp. A-23. The prior Order and Opinion of the Honorable Eric G. Bruggink of the United States Court of Federal Claims entered June 23, 1997 at No. 96-CV-216 is published in 38 Fed. Cl. 192 (1997) and is reprinted in the Appendix to this Petition at pp. A-11. A Complaint in Condemnation CIV 72-339 was filed in the United Strates District Court For The District Of Arizona by William C. Smitherman, United States Attorney and Richard S. Allemann Assistant United States Attorney at the request of the Secretary of the Army for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties of interest by authority of Act of Congress approved February 26, 1931 and is reprinted in the Appendix to this Petition at pp.A2.

JURISDICTION

The Judgment Order of the United States Court of Appeals for The Federal Circuit was entered on February 18, 1998. The jurisdiction of this Court is invoked pursuant to 28 U. S C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action was filed pursuant to 28 U.S.C. § 2501 (1992)

in the Federal Court of Claims on the basis that the Army Corps of Engineers had taken the Copper Chief Mine and the entire surrounding area consisting of 3,179.94 acres of land more or less in the County of Yuma, State of Arizona for the Yuma Proving Ground, a military ordinance testing facility without just compensation in violation of Plaintiff's Fifth Amendment Right. The pertinent sections of these Constitutional and Statutory Provisions are set forth in the Appendix at pp A26. The statutory basis for jurisdiction of the Federal Court of Claims is the Tucker Act, 28 U.S.C. § 1491. The Federal Court of Claims has exclusive jurisdiction to review these kinds of claims ('Taking's Claims') against the United States. The United States Court of Appeals for the Federal Circuit had jurisdiction under 28 U.S.C. 1295 (a) (3) on appeal from a timely filed final order.

STATEMENT OF THE CASE

The Yuma Proving Ground authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258 (a)), and acts supplementary thereto and amendatory thereof, and under further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); Section 2663 of Title 10, United States Code, which authorizes the acquisition of land for military purposes. Funds for such purposes were to be made available by the Department of Defense Appropriations Act for 1973, or, if not enacted prior to July 1, 1972, by a joint resolution of Congress. The interest in the property to be acquired is the estate taken for a term of years beginning July 1, 1972 and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States until March 31, 1977 pursuant to Civ 72-339 PHX In the United States District Court For The District of Arizona.

Ruth Kerr Jakoby, M.D.,F.A.C.S.,J.D., hereinafter referred to as Petitioner acquired three Treasurer Deeds to the Copper Chief Mine from the State of Arizona on or about June 20, 1975 as an investment for her retirement. The property acquired included a one-half interest in 13 patented mining claims wholly located within the boundaries of the Yuma Proving Ground (YPG) in Arizona. The Yuma Proving Ground is operated by the Government as a facility for various military projects, including the testing of explosives and other munitions; authorized by Public land Order 848, effective January 1, 1950, subject to valid existing right of patented mine owners to ingress and egress through the YPG for purposes of accessing those patented mining claims. Some Claims of the Copper Chief Mine were patented on or about April 13, 1908.

B. David Reichardt, Chief Arizona Real Estate Office in his August 5, 1975 letter stated :

> "the mining claim is presently in the exclusive possession of the Government under Civil No.72-339-PHX on file in the United States District Court for the District of Arizona, Phoenix, Arizona. The land within the mining claim is considered an integral part of the military installation and entry thereon cannot be permitted at this time."

The Army Corps of Engineers allowed Jakoby and six associates the right of entry on to the YPG on February 22, 1976 subject to limitation of ingress and egress to existing roads or trails or in the event of no road or trail leading to the mining properties subject to using the road or trail which leads most closely to the properties and minimizing travel when not on an existing road or trail. Petitioner was also required to sign a waiver:

"The United States, its officers,agents, and employees shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the entry upon the installation hereunder, nor for damages to your property or for injuries to your person, nor for damages to the property or injury to the person of your associates , agents, servants, or employees, or others who may be on said installation at your or their invitation, arising from or incident to government activities, and you shall hold the United States harmless from any and all such claims"... "The right of entry upon the installation for the purposes hereinabove stated on 21 and 22 February 1976 shall not be effective until you have signed the acceptance..."

Petitioner as directed by the Army Corps of Engineers kept her acceptance and permission to traverse the Yuma Proving Ground in her possession at all times while within the Yuma Proving Ground and limited her travel thereon to the weekends after first calling the Yuma Proving Ground's air space and range control to ascertain that there would be no testing of ordinance during off duty hours on Saturday and Sunday. From 1976 until 1982 Petitioner made multiple trips to the Copper Chief Mine with geologists, mineralogists, geophysicists and graduate geology students in order to study the geology of the Copper Chief Mine and to do the necessary field work for its development.

In 1982 , Petitioner, John Robison and Mary Robinson

entered into a lease DACA09-5-82-152 with the United States through the Department of the Army Corps of Engineers. The Government paid $1200.00 per year for an "evacuation estate" and other rights including prohibition of the use of the land for any purposes other than mining; restriction on routes commencing north of the land approved in writing , by commander YPG and in no case any route south of one mile of the southerly most point of the Copper Chief Mine; maintaining the right to search all buildings, facilities vehicles on the land or access routes. Reserving, however, to the owners, their heirs and assigns all such rights and privileges in the land as may be used without interfering with or abridging the rights of the Government. The lease encumbering the Copper Chief Mine was terminated effective midnight, July 28, 1985. On or about December 6, 1985 Jakoby assigned one-third of her one-half interest in the Copper Chief Mine to Northern Virginia Law School.

The Government maintains that it has never taken the Copper Chief Mine but if it has then it has taken it over six years from the time Jakoby filed the underlying complaint in the United States Court of Federal Claims on April 26, 1996. The Government states that:

> "There are currently no restrictions of any kind on Jakoby's access to the Copper Chief Mine or any of her other properties that are within the confines of YPG, nor have there been any restrictions of any kind on her access to those properties since 1985 when the leases were terminated".

Petitioner maintains that the presence of the YPG surrounding her 13 patented mining claims comprising the Copper Chief Mine has prevented her from selling a valuable Chrysocolla deposit and or the Copper Chief

Mine, or developing a valuable underground copper, gold and silver ore body because it is impossible to move heavy drilling equipment to the mine site, or even drive a truck to the mine site to haul out the already mined Chrysocolla. There is no road of any kind to within 3/4 to a mile of the Copper Chief Mine. The YPG hid over a hundred active land-mines off road and at first denied their presence until shown a Government article describing an experiment using infra-red in order to locate 36 hidden land-mines simulating conditions similar to the terrain in Kuwait during Desert Storm in March 1991 (within the six year statute of limitations or after April 22, 1990 as the aforesaid complaint was filed April 22, 1996 in the United States Federal Court of Claims). Petitioner filed an affidavit of Professor Donald Burt a Professor of Geology at Arizona State University, Tempe Arizona, who stated under oath and under penalty of perjury that:

> "Clearly, the presence of the Yuma Proving Ground has thus far prevented the development or even evaluation by drilling of gold or copper mines in the confines of the Yuma Proving Ground, even though similar areas outside of the proving ground have many developed mines and good road and air access."

A video proffer of Professor Burt who showed how hidden land mines marked on a map of the YPG and Copper Chief Mine could endanger

petitioner on her way to a Chrysocolla ore deposit as there was no road to the area and a direct route off-road could take petitioner over the area of hidden land-mines.

The Government initally denied the presence of land-mines on the YPG, but then admitted their presence after an affidavit was obtained from a small aircraft pilot, Ms. Katherine McGeehon who had a government article describing the land-mine experiment on the YPG in March 1991. The Government produced an affidavit from Mr. James R. Marler, a Realty Specialist for Yuma Proving Ground (YPG), who stated;

> "There are currently no restrictions of any kind on Jakoby's access to the Copper Chief Mine or any of her other properties that are within the confines of YPG, nor have there been any restrictions of any kind on her access to those properties since 1985 when the leases were terminated. Further, there are no restrictions of any kind on Jakoby's mining activities or on the use of heavy machinery or explosives on her property. Dated February 14, 1997."

The Government filed an affidavit by Richard V. Albert, Test Director and project engineer for the Yuma Proving Ground , who stated:

> "I am also familiar with Plaintiff's [Petitioner's] claim that the 1991 land mine test activities conducted on YPG blocked or precluded access to her properties. They did not."

The Government filed an affidavit by Eusebio Lopez , a mechanical engineer who stated:

> " I am also familiar with Plaintiff's [Petitioner's] claim that the land mine test activities conducted on YPG blocked or precluded access to her properties. They did not.

4. In March of 1991 certain land-mine tests were conducted on YPG. These tests involved land-mines that did not have fuses and were conducted in a remote area at least 1 mile north east of Cibola Lake Road on YPG's eastern boundary .

5. The 1991 land mine test activities conducted north east of Cibola lake Road posed no risk or danger to civilians travelling on Cibola Lake Road and did not require us to close that road. In fact civilians and privately owned vehicles traveled over Cibola Lake Road with no restrictions while the land-mine tests were being conducted.
6. There is no reason why in March of 1991 Plaintiff [Petitioner] could not have safely and without restriction crossed Cibola Lake Road. There would have been no reason for her to cross the land mine test area to access her properties."

On April 25, 1996 in the United States Court of Federal Claims Judge Bruggjink's order was entered:

1. Counts 2 and 3 are dismissed. [reckess endangerment and tortious interference]
2. The request for a trial by jury is denied.
3. Plaintiff is directed to file an amended complaint.It is not necessary to re-allege those facts alleged in the present complaint. Plaintiff is directed however, to more specifically allege the events that constituted a taking,

and to furnish the court in the amended complaint with the plaintiff's best understanding of when those events occurred and when she learned of those events. ."....

Petitioner filed an amended complaint on May 24, 1996 . Petitioner was unable to give an exact date when the Copper Chief Mine was taken in her amended complaint, but in petitioner's opinion the Copper Chief Mine was taken because she was unable to sell it or further develop it because there was no road to the Copper Chief and it was unsafe to go there because of the surrounding YPG activities. The specific active land-mine test in March of 1991 was not mentioned in the amended complaint but danger from ordinance was alleged in general:

"32. Unknown and probably dangerous weapons are and were being tested on the proving ground preventing the quiet enjoyment of this property, further development and sale of the mine."

"33. Germ warfare or the use of bacteria may also have been tested on the Yuma Proving Ground."

"34.The presence of the Army Proving Ground surrounding the Copper Chief Mine permanently deprived Jakoby from a beneficial use of her property and its sale which has resulted in an

actual as well as a constructive taking of Jakoby 's [Petitioner's] property without compensation in violation of Jakoby's [Petitioner's] rights of Due Process under the United States Constitution...." nor shall private property be taken for public use without just compensation."

35."Jakoby [Petitioner] decided to sell the remaining two deeds to the Copper Chief Mine less than two years ago [Amended Complaint was filed May 14, 1996] to supplement her retirement income. Jakoby has been unable to sell her two remaining Copper Chief Mine Deeds because of no right of way or assurance of safety on the Yuma Proving Ground."

The Government filed a motion to dismiss on August 26, 1996. A hearing was held on November 25, 1996 for oral argument on the motion to dismiss after briefs had been filed in response, reply and sur-reply. The motion to dismiss was denied without prejudice and Judge Bruggink said:

"and I think you know what I am looking for in terms of a motion for summary judgment. And what you are going to get is a motion that argues that there cannot have been a denial of access, or at least in the last six years there has never been a denial of access."

Accordingly the Government filed a Proposed Findings of Uncontroverted Fact and Motion for Summary Judgment February 21, 1997. A Counter Statement of Facts, cross

motion for declaratory judgment and Response to Government's Motion for Summary Judgment was filed by Petitioner on April 1, 1997. Petitioner's Motion to Compel Discovery as to the location of hidden active land-mines was denied March 31, 1997, however, in Judge Bruggink's order he noted that the Government represented that it would treat Plaintiff's [Petitioner's] motion to compel discovery as an ordinary request for discovery under RCFC 33 and 34 and would provide Plaintiff with information regarding" 'where and when land mines were placed on the Yuma Proving Ground and when they were removed, if they were indeed removed'" . The Government replied April 8, 1997:

" We have confirmed that in 1991 the Lawrence Livermore Laboratories was involved in certain aircraft testing activities that included making passes over a live mine field containing 36 high explosives mines. The mine field was located on the Barry M. Goldwater Air Force Range which is outside the confines of the Yuma Proving Ground and in no way impaired or affected your access to the CopperChief Mine. These facts will be more fully detailed in the Supplemental Affidavit of James R. Marler that will be attached to the United States Reply in Support of its Motion for Summary Judgment."

Petitioner replied to the Government on April 11, 1997

"The 36 active high explosive mines that I [Petitioner] referred to were placed on the Yuma Proving Ground in March 1991 and I would refer you to Energy & Technology Review December 1991; an article entitled "Airborne Detection of Buried Mine Fields' pp 9-21.

This article is available from
National Technical Information Service,
U.S.Department of Commerce 5285 Port Royal
Road Springfield,Virginia 22161"

Petitioner was unable to obtain an affidavit from one of the physicists directly involved with locating hidden active land-mines on the Yuma Proving Ground because the physicist was afraid of losing her job at LawrenceLivermore National Laboratory if she made an affidavit against the Government. Therefore, Petitioner obtained an affidavit from Ms. Katherine McGeehon,a licensed small aircraft pilot, who was familiar with the physicist and had seen a similar experiment demonstrated at the Lawrence Livermore National Laboratory. Ms. McGeehon was familiar with the article describing the experiment using infrared to locate underground hidden land-mines; had flown over Arizona in a small airplane and was also familiar with maps and navigation.

In the Government's Response to Petitioner's Reply to Government's Motion for Summary Judgment the Government maitained that:

"1. The land mine test activities described by Plaintiff [Petitioner] did not interfere with or preclude access to her property...

2.No admissible or credible evidence has been introduced to support Plaintiff's assertion that land-mine test activities precluded or even interfered with access to her property.

a. The Mc Geehon Affidavit is not based on personal knowledge and does not set forth facts that would

be admissible in evidence...

b. Ms. Mc Geehon does not appear to be competent to testify as to the matters set forth in her affidavit..."

The Government had at first denied the presence of any land mines on the Yuma Proving Ground; then admitted their presence, but in response to Petitioner's affidavits denied that the March 1991 land mine test activities conducted on the Yuma Proving ground precluded access to Petitioner's properties.

In addition to Ms. McGeehon's affidavit ,Professor Donald Burt had made an affidavit on January 23, 1997 stating :

"Clearly, the presence of the Yuma Proving Ground has thus far prevented the development or even evaluation by drilling of gold or copper mines in the confines of the Yuma Proving Ground"...

Subsequently Professor Burt was videotaped demonstrating on maps how land-mines located north of Cibola Road would interfere with Petitioner's access to her mining property to remove an already mined Chrysocolla ore deposit.

April 17, 1997 Petitioner examined maps of the Yuma Proving Ground at the Department of Justice . Areas were marked showing where hidden land-mines had been located. Subsequently, Petitioner was given similar maps without the markings of the location of the land-mines but was given the coordinates of the location of the land-mines over the phone. The maps with the pencilled in coordinates were then taken to Arizona and shown to Professor Donald Burt at Arizona State University who examined them and a video tape was made of him and the maps indicating the relationship between the location of the land-mines and Chrysocolla deposits and Cibola Road on May 16, 1997.

Petitioner filed a Sur-Response to the Government's Reply in support of its Motion for Summary Judgment April 22, 1997 by leave of Court. Petitioner filed a motion for leave of court on June 2, 1997 to file the video tape taken of Professor Burt May 16,1997 showing how the YPG prevented the development of the Copper Chief Mine and how the land-mines prevented the removal of the already mined Chrysocolla deposit that Petitioner wanted to sell. On June 5, 1997 the Government filed a response to Deny Petitioner's motion to file the May 16, 1997 video tape because Professor Burt had not been sworn in and his testimony was not under threat of perjury. On June 12, 1997 Petitioner replied to Government's response to deny Petitioner's motion to file videotape of proffer of Professor Burt's testimony. On June 23, Judge Bruggink denied Petitioner's motion to file video tape and judgment was rendered dismissing the complaint pursuant to Rule 58 with Summary Judgment for theGovernment and denying Petitioner's Cross Motion for a Declaratory Judgment of Government liability for a "Taking".

There was no trial or hearing after the first hearing on the Government's motion to dismiss. There was no oral argument, direct examination of the Petitioner's witnesses or cross examination of the Government's witnesses as to danger from hidden land-mines or other Proving Ground activities. There was a trial by affidavit only and even the video proffer of expected testimony was denied.

On July 17, 1997 Petitioner filed a timely appeal to the United States Court of Appeals for the Federal Circuit which had jurisdiction under 28 U.S.C. 1295(a) (3) because this was an appeal from a final order of the United States Court of Federal Claims which had exclusive jurisdiction to review "takings claims" against the United States under the Tucker

Act, 28 U.S.C. 1491 Petitioner's Brief was filed September 22, 1997 and Petitioner filed a motion pursuant to Rule 27 for leave of the appellate court to file the video proffer of an expert geologist's, Professor Donald Burt's expected testimony as to the prevention of development of the Copper Chief Mine by the Yuma Proving Grounds testing of various ordinance including but not limited to active land-mines. This video had been returned to petitioner by the Federal Court of Claims after denial of the motion to admit by leave of court. After the Government's reply brief was filed, the Motions Panel, Judge Bryson granted the motion to admit the video for limited purposes. Judge Bryson denied a request for further discovery and a motion to file altered maps. The Government filed its brief for Appellee the United States and Appendix November 24, 1997 Petitioner, appellant Jakoby filed her reply brief on December 8, 1997 and Appendix December 15, 1997.Petitioner's request for oral argument was treated as a motion and denied by the merits panel. Jakoby v. United States 97-5108 was submitted on the briefs before Judges Rich, Schall and Gajarsa on February 2, 1998.

On February 18, 1998 The United States Court of Appeals for the Federal Circuit A-23 affirmed The United States Court of Claims judgment rendering the following opinion:

> ..."we treat this dismissal as a grant of the Government's motion for summary judgment. On appeal Jakoby [Petitioner] raises no issue of law or fact that was not expressly and adequately addressed in the well reasoned opinion of the trial court. The arguments Jakoby [Petitioner] raises regard-

ing the statute of limitations are greatly inapposite. The six year statute of limitations applies to her claim and is not tolled. See Hopland Band of Porno Indians v United States, 855, F2d 1573, 1576-77 (Fed Cir. 1988) (six-year statute of limitations is a jurisdictional requirement and 'must be strictly construed'). In addition Jakoby's [Petitioner's] arguments regarding the effect of the land mine tests are insufficient to support her taking claim. When faced with a defendant's summary judgment motion, a plaintiff is not relieved of its own burden of offering admissible evidence that if believed would support a verdict, for the mere existence of some allegations of factual dispute will not defeat an otherwise properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc. 477 U.S.242, 108 S.Ct. 2505 (1986) Therefore we are not persuaded to disturb the reasoning of the trial court, and we affirm the decision of the court for the reasons set forth therein."

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN ,BUT SHOULD BE ,SETTLED BY THIS HONORABLE COURT.

Congress has established a six-year time limitation as a juridictional requirement for the Federal Court of Claims that is inconsistent with the Fifth Amendment of the Constitution of the United States and would defeat a goal for the Federal Court of Claims to uphold the Constitution's Fifth Amendment's free and independent clause "nor shall private property be taken for public use without just compensation" which has no implied time restriction. If jurisdictional requirements are satisfied as to subject matter in a "takings" case, then statute of limitations arguments should not be used for purposes of summary judgment and the courts equitable tolling of the statute of limitations is required to give equal access to the Federal Court of Claims and afford the plaintiff equal access to the court and equal protection of the law. In the case of the "Taking " of the Copper Chief Mine by the Yuma Proving Ground's restricted access and ordinance testing activities, Petitioner was denied not only her fifth Amendment right to just compensation but also her Seventh Amendment right to a jury trial ,as well as her right to cross examine the Government witnesses whose affidavits were in error as to access and the location of the Copper Chief Mine.Petitioner was denied direct examination of her expert witnesses who were familiar with the access to the Copper Chief mine and equal protection of the law or her Fourteenth Amendment Rights as well.

CERTIORARI SHOULD BE GRANTED TO GUARANTEE UNIFORMITY IN ACCESS TO THE FEDERAL COURT OF CLAIMS AND THE PROPER USE OF SUMMARY JUDGMENT

"Taking" Claims are fact intensive and summary judgment should not be used when there are material issues of factual differences. The court in this case acted as a fact finder without a trial and deprived petitioner of her Seventh Amendment Rights. Mining by its nature is a long term investment. If the Government is allowed to deny claims of a taking by prevention of a mine's development within a six year period, then the Government would be able to take almost any mining property without just compensation, as historically it takes many years, well over six to economically develop a mine. Jakoby [Petitioner] owned the patented claims to the Copper Chief Mine over twenty years having purchased the mine from the State of Arizona in 1975 or thereabouts as an investment for her retirement. Access had always been a problem and Professor Burt using the Army maps showed the lack of any road to within 3/4 of a mile to the Copper Chief Mine on the Yuma Proving Ground. Arguments about the lack of road which are a sine qua non of a taking were disallowed because the lack of a road was known over six years prior to the filing of the claim and therefore according to Judge Bruggink's ruling not within the statute of limitations for jurisdiction within his court nor would he allow equitable tolling of the Statute of limitations despite the Government's hiding active land mines without informing Petitioner about them . Jakoby walked to the mine off-road. She wanted to keep the mine despite the lack of a road until she learned about the danger of hidden land-mines in 1991. Judge Bruggink stated :

> "For this court to toll the statute of limitations, the plaintiff" [Petitioner] "must demonstrate that the Government "has concealed its acts with the`

result that plaintiff [Petitioner] is unaware of their existence or that [the],,, injury was 'inherently unknowable' at the accrual date.' Japanese War Notes Claimants Ass'n v.United States, 178 Ct. Cl. 630, 634, 373 F.2d 356, 359, cert. denied 389 U.S. 971, 88 S. Ct. 466, 19 L. Ed.2d 461 (1967).Under this standard, the subjective interpretations of the facts by the plaintiff do not matter and ignorance of a claim cannot, alone, form the basis for tolling.Catellus, 31 Fed. Cl. at 405 (citing Coastal Petroleum Co. v. United States, 228 Ct. Cl. 864,866 (1981))."

This standard is inapposite to that of the standard for summary judgment All reasonable inferences must be drawn against the party whose motion for summary judgment was granted by the lower court, Mingus Construction Inc. v. United States 812 F 2d 1387, 1390 Fed Cir 1987. The evidence of the non-moving party is to be believed and all factual inferences are to be drawn in its favor, C. Sanchez and Su Inc. v. United States 6 F3d 1539, 1541 (Fed Cir 1993). The court disallowed all factual inferences from being drawn concerning danger from hidden land-mines and off-road travel across a proving ground in Petitioner's , the non movant party's favor. The accrual date is when all events that fix the date have taken place. Therefore, the accrual date should be when Petitioner was ready to bring in heavy equipment but could not because of a lack of a road and or when Petitioner wanted to sell the Copper Chief and sale as well as travel by heavy equipment was prohibited by lack of a road and there was hidden danger in off-

road travel.

> "The purpose of a motion for summary judgment is to test the intrinsic merits of the case and to determine prior to trial whether the parties have a real basis for relief or defense. Such a motion is not a substitute for trial, and where the record examined in the light most favorable to the non-moving party, shows any material facts or factual inferences in dispute, we have consistently held that summary judgment is inappropriate."

Benton-Volvo-Metairie, Inc. v. Volvo South-west Inc., 479 F2d 135 (5th Cir. 1973). There was no equitable tolling of the statute of limitations even though the Fifth Amendment "nor shall private property be taken for public use without just compensation" is without any presumed statute of limitations as it was added as a free and independent clause following "...nor be deprived of life, liberty, or property, without due process of law;" The father's of the constitution were not repetitious. They believed in the necessity of an independent clause following the clause about due process. "Nor shall private property be taken for public use without just compensation." This is unqualified and meant to stand alone. Judge Smith has been quoted in the Washington Post as saying:

> "Every free government can be judged by the degree to which it respects the life, liberty and property of its citizens," "the United States stands tall among the nations because it is a just nation."

CERTIORARI SHOULD BE GRANTED TO GUARANTEE JUST COMPENSATION IN REGULATORY TAKINGS OF MINERAL RIGHTS

Mining in the past has been a very important factor in the development of western states and particularly Arizona. The Yuma Proving Ground took by eminent domain over 3179 acres which lies within a mineralized belt of Arizona. There are other patented mines that have been "taken" by the proving ground and there are valuable other lands containing mineral wealth that have been taken by the Government or prevented from development by regulatory takings because of national parks or to preserve other natural resources or endangered species.

At the time the Yuma Proving Ground took the desert land by eminent domain for ordinance testing in 1950, the real mineral wealth of the area was largely undetermined. There were several patented mines such as the Copper Chief Mine within the geographic confines of the Yuma Proving Ground but they were not being actively mined at the time. Without modern heavy equipment and good, well graded, wide roads the mines were not economical but with the advent of open pit mines, heavy equipment, well graded roads and new technology such as heap leaching, formerly uneconomical mines would become valuable. Heap leaching developed at the time Jakoby acquired the Copper Chief Mine from the State of Arizona in 1975 and new over two-four hundred ton ore carrying caterpillar trucks have been developed and computerized, maximizing economical haulage of even low grade ore in open pit mines. The Copper Chief had a valuable Chrysocolla ore deposit already mined ready for sale, which could not be hauled out across the Proving Ground because of the lack of a road and the danger from off-road travel from hidden active landmines placed on the Proving Ground north of Cibola Road.

The Government admitted the placement of the hidden land-mines north of Cibola Road in March of 1991.

The Federal Court of Claims used an arbitrary and capricious standard in deciding all arguments against summary judgment such as a lack of road of being inadmissible because it had been known for over six years that off-road travel was necessitated by the lack of any road. Off-road travel was dangerous when the Government starting experimenting with locating hidden land-mines using new infrared technology during Desert Storm.

The danger to Jakoby came from off-road travel necessitated by the lack of any road within a mile of her property. However the placement of hidden land-mines was unknown. The court held that Petitioner did not show how the land-mines interfered with access. The location of the land-mines was unknown so that in Petitioner's opinion all access was cut-off. The court believed that Jakoby should have asked where the land-mines were located. When the Government was asked, it first denied the presence of land-mines. Then the Government said they posed no danger to travel on Cibola Lake Road by affidavit. Jakoby had to travel off-road. The Government affidavit stated that " there would have been no reason for her to cross the land mine test area to access her properties". However, Petitioner could have shown that both Mr. Lopez and Mr. Albert were misinformed as to the location of the Copper Chief Mine and various ore deposits. A video showing maps demonstrating access by a proffer of Professor Burt's expected testimony was not allowed by the Federal Court of Claims because of the Government's objection that it did not comply with Appendix H and Rule 56f of the Rules of the Federal Court of Claims. The affidavit of Mr. Eusebio Lopez stated:

> " There would have been no reason for her [Petitioner-Jakoby] to cross the land-mine test area."

Petitioner was not allowed any cross examination of Government witnesses or direct examination of her own expert witnesses.

The court noted that "even if it were to accept the video taped interview of Professor Burt, there is no indication in that interview that Ms. Jakoby was ever physically denied access to her property because of the land-mine testing at YPG. Although Professor Burt points out that a possible route to plaintiff's property "might" have taken her into, or at least close to, the land-mine field, his statements do not indicate that she was denied full access to her property.

Petitioner had a sworn affidavit under threat of perjury from Professor Donald Burt stating :

> " Clearly the presence of the Yuma Proving Ground has thus far prevented the development or even evaluation by drilling of gold or copper mines in the confines of the Yuma Proving Ground, even though similar areas outside of the proving ground have many developed mines and good road and air access."

Jakoby was denied her Seventh Amendment Right to a trial to resolve material issues of factual dispute as to the prevention of development of the Copper Chief Mine or a regulatory taking of her interest in the Copper Chief Mine and also denied her Fifth Amendment Right to just compensation for this taking. The Appellate Court should not have affirmed the Federal Court opinion as there was an abuse of discretion in the evidentiary findings which were not amenable to summary resolution. Furthermore the law was incorrectly applied to undisputed facts.

In Civ 72-339 PHX A COMPLAINT IN CONDEMNATION was filed in the United States District Court for the District of Arizona by the United States of America against 3,179.94 acres of land more or less in the County of Yuma State of Arizona; M.S. Horne, et al., and UNKNOWN OWNERS, as Defendants. The Copper Chief Mine was part of tract 317

see A2. Petitioner acquired the interest of the State of Arizona under 7. Supra.

"The County of Yuma, Arizona, and the State of Arizona, may have or claim an interest in the property by reason of taxes and assessments due and exigible."

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "unknown owners".

9. The plaintiff has been in possession and occupancy of those lands designated as Tracts Nos. C-301, C-302,C-303, 317, 318, and 319 condemned in this cause under No. Civ. 6382-Phx. (WEC) .....

Wherefore, the Plaintiff [United States] demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper."[see A2]

Since Petitioner has an interest in tract 317 which is part of the Copper Chief Mine as well as other property within the confines of the YPG The Federal Court of Claims incorrectly interpreted the law in finding that no taking had taken place. Petitioner was unable to sell her interest in the Copper Chief Mine after she retired. Therefore she demanded just compensation after 1991 or well within the six year statúte of limitations and the Fifth Amendment should quarantee peltitioner just compensation for a taking.

A regulation that leaves a land owner without economically beneficial use is a per se taking of property requiring compensation, Lucas v. South Carolina Coastal Council 112 S. Ct. 2886 (1992). While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. The Supreme Court found in Pennsylvania Coal v. Mahon, 260 U.S. 393,415 (1992) a taking because a statute that prohibited subsidence totally destroyed the right to mine coal. This is similar to the YPG ordinance testing activities and the lack of a road requiring off-road travel that prevented the development and sale of the Copper Chief Mine and an already mined Chrysocolla ore dump. This frustrated and prevented Petitioner's "investment-backed expectations". The lower court refused to toll the six year statute of limitations jurisdictional requirement and so denied the regulatory taking as the absence of a road was "open and notorious" and the ordinance testing was known to Petitioner in the 1970s after she acquired the Copper Chief Mine. The decision in Lucas does not square with the statute of limitations. Mining developments are necessarily long term The Copper Chief Mine was a long term investment for retirement. The Fifth Amendment requires due process and just compensation for a taking of property. The Federal Court of Claims should have determined Government liability and a declaratory judgment for Petitioner. The United States Court of Appeals for the Federal Circuit should have reversed the summary judgment for the Government rendered by the United States Federal Court of Claims because of material factual issues in dispute which would warrant a trial as well as the incorrect application of the law to undisputed facts.

CERTIORARI SHOULD BE GRANTED TO GUARANTEE EQUAL PROTECTION OF THE LAW

Petitioner did not waive her right to a "takings" cause of action because she signed a waiver not to hold the United States responsible for damages to property or injuries ...arising from government activities...in order to cross the Yuma Proving Ground and access her property on the Yuma Proving Ground on February 21 and February 22, 1976. Jakoby wanted to keep the property and develop it as an investment for her future retirement. She was aware that the YPG had taken all the surrounding land but had inadvertently not taken the Copper Chief Mine because the Army Corps of Engineers had mistakenly located the Copper Chief Mine north of the boundary of the facility. In Civ 72-339, A-2 Complaint in Condemnation the United States had initially omitted it in the 3179.94 acres that it had taken. It was added in 1975 after Petitioner showed the Army Corps of Engineers that the Copper Chief Mine was within the YPG. The Petitioner gained the State of Arizona's interest in the property by reason of taxes and assessments under 7. supra by acquiring three deeds to the Copper Chief Mine at a delinquent tax sale auction. The time of the "taking" is in dispute. The fact that the Government operated the YPG as a military and training facility since the1940's does not set the date of the taking. Even though the Government brought public condemnation proceedings to secure the leaseholds to mining claims prior to Jakoby's purchase of the Copper Chief Mine this does not establish the time of the taking as Jakoby purchased her rights from the State of Arizona's rights in 1975. A cause of action for a compensable taking of property under the Fifth Amendment accrues when all of the events that fix the Government liability have occurred and the property owner was or should have been aware of their existence. Hopland Band of Pomo Indians, 855 F 2d. at 1577. Fallini v. United States, 56 F.3d

1378,1380 (Fed.Cir. 1995), cert. denied- U.S.-,116 S. Ct. 2496 (1996). Petitioner knew that the YPG surrounded her mining claims and some of its activities were open and notorious. However, Jakoby wanted to keep her mines, assess and develop them despite the lack of a road and the firing of weapons during duty hours. She thought the mines could be developed despite these serious restrictions and proceeded to do the necessary field work to develop the mine by foot even though there was no road and during off-duty hours when she was assured by the ground and space control that no shelling or shooting of armaments was being done. The taking accrues when all the events that fix the Government's liability have occurred. The Government act fixing the United States liability occurred in March 1991 when the United States hid over thirty six active land-mines off-road where Petitioner had to travel to do her field geology and drive a truck to remove an already mined Chrysocolla ore deposit.

The Government did not inform Jakoby that it was hiding land-mines and at first even denied to Jakoby that there were any land-mines on the Yuma Proving Ground. It was not until this time that Jakoby realized that technology of war fare had so changed that there were unknown and hidden hazards. Desert Storm had resulted in new weapons that might be tested , including infra-red to detect hidden land-mines or possibly other weapons of mass destruction such as bacterial warfare. The YPG had the right to test whatever it felt was necessary within the boundaries of the YPG and could not be relied upon to inform Jakoby. Jakoby had accidentally heard about the hidden land-mines from a physicist who had gotten sick on the YPG and had to leave the experiment. Jakoby had not been informed by the Government of the land-mines and the lower court held

> "Absent an actual danger to civilian traffic [the YPG] was under no obligation to inform Ms. Jakoby of its testing activities."

There had always been some danger to Petitioner while on the YPG or why would the Government have required her to sign a waiver in order to cross into the YPG. However, the risk was unacceptable when the YPG began testing hidden land-mines and labelled the patented mining claims on the map abandonned. Petitioner was unable to sell the Copper Chief Mine and was not allowed discovery as to what other owners had been paid for their mineral rights. Mr. Reichardt of the Army Corps of Engineers had said he would not tell Petitioner what amount the various mineral rights had been evaluated for by AIM. This knowledge was not obtainable. However, Jakoby assessed the value of mineral rights to the Copper Chief Mine at $20,000,000 and she owned two thirds of a one-half interest in the property. The Federal Court of Claims ruled against a necessary joinder of the other owners of the Copper Chief Mine because the lower court determined that Petitioner's claim of a "Taking" failed. However, Jakoby should have been allowed to determine what other non-parties were paid for their interest as she wanted to sell the property and could not because of the Government having taken her mineral rights without just compensation in Civ 72-339 Phx Complaint in Condemnation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that her petition for a writ of certiorari be granted.

Respectfully submitted,

Ruth Kerr Jakoby

Date:
April 28, 1998

Ruth Kerr Jakoby, M.D.,F.A.C.S.,J.D.
2610 Blaine Drive
Chevy Chase,
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APPENDIX

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff,	
vs.	WEC CIV 72-339 PHX
3,179.94 ACRES OF LAND, more or less, in the County of Yuma, State of Arizona; M.S.Horne, et al., and UNKNOWN OWNERS, Defendants.	COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Secretary of the Army for the taking of property under power of eminent domain and for the the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421,

40§U.S.C.258a), and acts supplementary thereto and amendatory thereof,and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257);Section 2663 of Title 10, United States Code, which authorizes the acquisition of land for military purposes. Funds for such purposes will be made available by the Department of Defense Appropriations Act for 1973, or, if not enacted prior to July 1, 1972, by Joint Resolution of Congress.

3. The use for which the property is to be taken is for military purposes in connection with Yuma Proving Ground in Yuma County, State of Arizona.

4. The interest in the property to be acquired is the estate taken for a term of years beginning July 1, 1972 and ending March 31, 1973, extendible for yearly periods thereafter, at the election of the United States until March 31, 1997, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof,together with the right to remove, within a reasonable time after the expiration of the term taken, or any extension thereof, any and all improvements and structures heretofore or hereafter placed thereon by or for the United States; subject, however,to existing easements for public roads and highways, public utilities, railroads and pipelines.

5. The property so to be taken is described as follows, to wit:

TRACT NO. C-301

The southwest quarter (SW 1/4) of Section Twenty-two (Sec. 22), Township Five South (T5S), Range Fifteen West (R15W),Gila and Salt River Meridian, Yuma County Arizona.Containing 160 acres,

more or less.

TRACT NO. C-302

All of Section Thirty -Six (Sec. 36), Township Five South (T5S) , Range Sixteen West (R16W) Gila and Salt River Meridian, Yuma County, Arizona. Containing 671.08 acres, more or less.

TRACT NO. C-303

All of Section Thirty-two (Sec. 32), Township Five South (T -5S), Range Fifteen (R15W), Gila and Salt River Meridian, Yuma County, Arizona. Containing 669.92 acres, more or less.

TRACT NO. C- 310

All of Section Sixteen (Sec. 16), Township Seven South (T7S), Range Twenty West (R20W), Gila and Salt River Meridian, Yuma County, Arizona. Containing 640.00 acres, more or less.

TRACT NO. C- 311

All of Section two (Sec.2), Township Seven South (T7S), Range Twenty West (R20W), Gila and Salt River Meridian, Yuma County, Arizona. Containing 638.36 acres, more or less.

TRACT NO. C-316

The Northeast quarter of the Northeast quarter (NE1/4 NE 1/4) and the South one-half of the Northeast quarter (S 1/2 NE 1/4), Section Thirty-Two (Sec. 32), Township One North (T1N), Range Twenty-one West (R 21W), Gila and Salt River Meridian, Yuma County, Arizona. Containing 120.00 acres, more or less.

TRACT NO. 317

NORTH MODEL, SOUTH MODEL and GREENBACK Lode Mining Claims designated as Mineral Survey No. 2369; and COPPER PRINCE, GOLDEN DREAM and QUEEN OF ARIZONA Lode Mining Claims designated as Mineral Survey No. 2340; embracing a portion of unsurveyed Public Domain in Township Two North (T2N), Range Twenty-one West (R21W), Gila and Salt River Meridian, in the Weaver mining District, Yuma County, Arizona, according to the United States Patents recorded July 6, 1920, in book 50 of Deeds, pages 254 and 259, respectively, in the Office of the County Recorder, Yuma County, Arizona. Containing 117.21 acres, more or less.

TRACT NO. 318

The HERCULES, SELF DEFENSE and GLADIATOR Lode Mining Claims designated by the Surveyor General as Lot No. 2339; embracing a portion of unsurveyed Public Domain in Township Two North (T2N), Range Twenty-One West (R21W), Gila and Salt River Meridian, in the Weaver Mining District as set forth in Patent from the United States of America, recorded July 6, 1920, in Book 50 of Deeds, page 251, in the Office of the County Recorder, Yuma County, Arizona.
Containing 61.88 Acres, more or less.

TRACT NO. 319

The CINNEBAR NOS. 1,2,3,4 and 5, Lode Mining Claims designated by the Surveyor General as Lot No. 2123; embracing a portion of unsurveyed Public Domain in Township Two North (T2N), Range Twenty West (R20W), Gila and Salt River Meridian, in the Weaver Mining District as set forth in Patent from the United States of America recorded November 23, 1906, in Book 23 of Deeds, page 139, in the Office of the County Recorder, Yuma County, Arizona.
Containing 101.49 acres, more or less.

6. The persons having or claiming an interest in the property whose names are now known are :

TRACT NO. C-301

M.S.Horne and Maurine D. Horne
James Stewart Co., an Arizona Corporation

TRACT NO. C-302

State of Arizona
M.S. Horne and Maurine D. Horne
James Stewart Co., An Arizona Corporation

TRACT NO. C-303

State of Arizona
M.S. Horne and Maurine D. Horne
James Stewart Co.. an Arizona Corporation

TRACT NO. C-310

State of Arizona

TRACT NO. C-311

State of Arizona

TRACT NO. C-316

State of Arizona

TRACT NO. 317

Frank Paselk
Gerald W. Hunt, Administrator of the
Estate of Eleanor V. Stafford, deceased
Unknown heirs and/or devisees of Eleanor
V. Stafford deceased

TRACT NO. 318

Goldie P. Thompson

TRACT NO. 319

Grace S. Carter Hopkins
Jack C. Fisher and Leta Fisher

7. The County of Yuma, Arizona, and the State of Arizona, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "unknown owners".

9. The plaintiff has been in possession and occupancy of those lands designated as Tracts No. C-301, C-301, C-303, 317, 318,319 condemned in this cause under No. Civ. 6382-Phx. (WEC).

WHEREFORE, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

William C. Smitherman
United States Attorney
"s/ Richard S Allemann"
Richard S. Allemann
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Phoenix, Arizona 85025

In the United States Court of Federal Claims

No. 96-216L
(Filed: April 25, 1996)

****

RUTH KERR JAKOBY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

****

ORDER

Plaintiff filed her complaint on April 22, 1996. In Count I she alleges that the United States, acting through the Army Corps of Engineers, took her interests in a copper mine. Such an allegation states a claim within the jurisdiction of the court. The other two counts of the complaint, one for reckless endangerment, the other for tortious interference, are not within this court's jurisdiction. Nor are claims before this court tried to a jury.

A claim for a constitutional taking must be brought within six years of the date of the claimed taking, unless the limitation period was tolled due to concealment or inherent unknowability. See 28 U.S.C. 2501; La Mear v. United

States, 9 Cl. Ct. 562 (1986). The complaint does not allege what precise events constituted a taking, or when they occurred. Because the attachments to the complaint suggest that the events complained of occurred in the 1970's and 1980's, however, the court is concerned that plaintiff may be unable to establish a taking within the last six years. Accordingly, the following is ordered:

1. Counts 2 and 3 are dismissed.
2. The request for a jury trial is denied.
3. Plaintiff is directed to file an amended complaint. It is not necessary to re-allege those facts alleged in the present complaint. Plaintiff is directed, however, to more specifically allege the events that constituted a taking, and to furnish the court in the amended complaint with the plaintiff's best understanding of when those events occurred and when she learned of those events. The amended complaint must be filed by May 24, 1996.

4. Defendant's answer or other response will be due sixty days after the Clerk's service of the amended complaint. Thereafter, plaintiff is responsible, pursuant to the Rules of the Court of Federal Claims, for serving defendant any future filings.

"s/ Eric Bruggink"
ERIC G. BRUGGINK
Judge

JAKOBY v. U. S.
cite as 38 Fed. Cl. 192 (1997)

In the United States Court of Federal Claims

Ruth Kerr Jakoby, Plaintiff,
v.
United States, Defendant
No. 96-216L.

United States Court of Federal Claims

June 23, 1997.

1

Ruth Kerr Jakoby, Chevy Chase, MD., pro se.

Lewis S. Wiener, United States Department of Justice, Washington D.C. for defendant. Anne C. Gamson, United States Army Corps of Engineers, Phoenix, AZ. of counsel.

OPINION

BRUGGINK, Judge.

This takings case alleges that the United States physically restricted all access to the plaintiff's patented mining claims, which are wholly located within the boundaries of the Yuma Proving Ground-a military testing facility run by the United States.

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1. The court notes that, although the plaintiff is proceeding pro se, she holds a juris doctor degree from Northern Virginia Law School. She has further represented to the court that she once served as acting dean of the Antioch School of Law.

Specifically the plaintiff claims that the Government denied access to her mining claim (1) by failing to maintain an adequate road across the Yuma Proving Ground and (2) by conducting land-mine tests in undisclosed "off -road" areas of the Yuma Proving Ground, which constructively prevented access to the mining claim. The matter is presently before the court on the defendant's motion for summary judgment and the plaintiff's motion for declaratory judgment. Oral argument is not deemed necessary. For the reasons discussed below, the Government's motion is well taken.

Background

On or about June 20, 1975, the plaintiff, Ruth kerr Jakoby, acquired a one-half interest in certain property and patented mining claims wholly located within the boundaries of the Yuma Proving Ground (YPG) in Arizona. The YPG is operated by the Government as a facility for various military projects, including the testing of explosives and other munitions. At the time Ms. Jakoby acquired her interest, the YPG was being openly operated for such military testing. On December 6, 1985, Ms. Jakoby assigned one third of her one-half interest in the Copper Chief Mine ("Copper Chief"), an undeveloped mine located on the property in question,

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2. Defendant previously moved to dismiss on substantially the same grounds. Oral argument was held November 26, 1996. At that time, the court denied the motion to dismiss and suggested that defendant file a motion for summary judgment.

to Northern Virginia Law School.[3]

In 1982, Ms. Jakoby entered into lease DACAO9-5-82-152 with the United States, through the Department of the Army Corps of Engineers. The lease covered "Tract 317", within which the Copper Chief is located, and expressly permitted the plaintiff to develop mining claims upon the subject property but allowed the Government to periodically order the property vacated upon seven days notice. The Government paid $1200.00 per year for the restriction and other rights on the property, but never actually required the property to be vacated during the lease term. On July 28, 1985, the Government's lease of plaintiff's property expired and was not renewed.

Ms. Jakoby initiated the present action on April 22, 1996, alleging a taking under the Fifth Amendment to the United States Constitution. Because of initial concerns about a timeliness of Ms. Jakoby's claims, the court, by its Order of April 25, 1996, requested that the plaintiff file an amended complaint " to specifically allege the events that constituted a taking, and to furnish the court the amended complaint with the plaintiff's best understanding of when those events occurred and when she learned of those events. " Plaintiff filed her amended complaint on May 14, 1996, claiming that her property rights in the Copper Chief Mine were taken by the Government through its failure to provide or allow meaningful access to the site. Specifically Ms. Jakoby complains that there is not an adequate roadway by which she can access her mine. This lack of adequate passage allegedly prevents her from developing

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3. It is not clear to the court, at this point in the litigation, who owns the remaining interests in the subject property. The Government has raised the possibility that indispensable parties may be absent from this proceeding. However, because the court finds that no taking claim has been stated by the plaintiff, it is unnecessary to further address this issue.

the full potential of the mine's resources because mining equipment cannot be driven in and out of the property. The absence of a complete roadway allegedly requires plaintiff to proceed on foot for "at least a mile" in order to gain access to her property. In addition, the air space above the YPG is restricted, which allegedly prevents the use of helicopters for moving equipment. Such lack of access, she claims, amounts to a taking of her property for which she is entitled to just compensation. Her amended complaint was imprecise as to the date that the "taking" was complete.

To satisfy both the court's, and defendant's, statute of limitations concerns, Ms. Jakoby complains-for the first time in her response to the Government's motion for summary judgment-that it is unsafe to cross the YPG "off-road" because of the possiblity of unexploded land-mines. Ms. Jakoby argues specifically that a 1991 land-mine test conducted at the YPG by the Government-the details of which were allegedly never disclosed to Ms. Jakoby -made it constructively impossible for her to access her property. Such a constructive denial of access to her property, she asserts, is a taking for which she should be compensated.

For its part, the Government responds that it has not taken any action whatsoever with respect to plaintiff's property since its lease expired in 1985. It submits affidavits from three YPG officials as evidence that the plaintiff now has, and has had since 1985, full and complete access to her property within the YPG. The Government,

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4. In her response brief Ms. Jakoby makes numerous references to the fact that former President George Bush recently made a widely-reported parachute jump at the YPG and was allowed to fly over the restricted airspsace to his jump site-airspace that Ms. Jakoby says she may not utilize. However, there is no evidence, and Ms. Jakoby has not argued that she has ever requested use of the air space above the YPG for access ot her mining claims.

relying on these affidavits, argues that no event sufficient to state a claim for a taking has occurred within the applicable six year statute of limitations period, and that land-mine tests conducted during 1991 at the YPG in no way endangered Ms. Jakoby or inhibited her access to the Copper Chief. The Government's stated position is that it does not want possession of the Copper Chief and that Ms. Jakoby is free to develop the property as she wishes.

Discussion

[1] Pursuant to 28 U.S.C. 2501 (1992), "Every claim of which the United States Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The plaintiff's complaint was filed on April 22, 1996. Thus, any claim that first accrued prior to April 22, 1990, cannot now be heard by this court. "A cause of action first accrues when 'all the events which fix the government's liability have occurred and the plaintiff was or should have been aware of their existence'." *Catellus Dev. Corp. v. United States.* 31 Fed. Cl. 399,405 (1994) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F 2d. 1573, 1575 (Fed. Cir. 1988)).

[2] The plaintiff asserts that a taking has occurred because there is not an adequate road or passage across the YPG by which to access the mining property . However, there is no evidence that there ever was such a road , or rational expectation that the Government would provide such a road. Ms. Jakoby represents that she did not know that the mine was located within the YPG when she purchased the rights to the property in 1975. Accordingly, any investment-backed expectations that were held by the plaintiff involved mere speculation regarding the availability of

access to the property. There is also no evidence that, subsequent to her purchase, she has ever asked the Government for permission to build such a road or asked the Government to build or assist her in building, a road to the mining property.

In any event, Ms. Jakoby admits that she learned of the alleged difficulty in accessing her property sometime in the 1970's, shortly after her purchase. Thus, without addressing the merits of the plaintiff's claim of entitlement to a Government-provided roadway, the court holds that such a right of access, if it existed, was denied more than six years prior to the filing of the plaintiff's complaint.

In a previous brief, addressing the Government's failed motion to dismiss, plaintiff asked that the statute of limitations be tolled because of concealment by the Government of "secret actions" and the resulting unknowability that a compensable taking's claim had accrued. Plaintiff has reasserted this argument in briefing the present motion, but the court holds that there is no credible evidence to support such an assertion.

For this court to toll the statute of limitations, the plaintiff must demonstrate that the Government "has concealed its acts with the result that plaintiff was unaware of their existence or that [the] ... injury was 'inherently unknowable' at the accrual date". *Japanese War notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634, 373 F.2d 356,359, cert. denied 389 U.S. 971, 88 S. Ct. 466, 19 L.Ed.2d 461 (1967). Under this standard, the subjective interpretations of the facts by the plaintiff do not matter and ignorance of a claim cannot, alone, form the basis for tolling. *Catellus*, 31 Fed. Cl. at 405 (citing *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 866 (1981)). In *Catellus*, the court directed that " '[w]here the actions of the government are open and notorious, we have pointed out that plaintiff is on inquiry as to its possible injury. Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run.' " *Id.* (quoting *Coastal*, 228 Ct. Cl. at 867).

[4] The conditions that allegedly constitute a taking , the lack of an adequate road or passage, were admittedly known to the plaintiff from the first time she visited her property in the 1970's. The absence of a road or other passage was "open and notorious". Plaintiff admits that essentially nothing has changed regarding access to the property since either 1975 or 1985. Rather, in her own words , "what has changed is that [Ms.] Jakoby wants either to sell the mine or arrange for further development." She alleges it was not until she decided to sell the property or further develop it that she became aware of the taking. However, absent inherent unknowability or concealment, none of which have been shown here, " ignorance of the facts will not toll the statute of limitations." *Bennett v. United States*, 36 Fed. Cl. 111, 113 (1996). Accordingly, the court declines to toll the running of the limitations period.

[5] The remaining question is whether the complaint , as amended, alleges any event within the six-year limitations period that might constitute a taking, and whether the Government is entitled to summary judgment on that claim. In her response to the Government's motion, the plaintiff asserts that the possibility of unexploded ordinance, and particularly a land-mine test at the YPG in 1991, prevented all access to the property in question. Ms. Jakoby claims that because the details of the test were never made available to her, she could not be sure there were not unexploded land-mines in the off-road areas surrounding her property.*5 Because of her lack of information, Ms. Jakoby asserts that she

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5. To the extent that the plaintiff complains only generally of the possibility of unexploded ordinance upon the YPG, which she says is supported by the warning signs she observed in 1987, such claims are untimely. Ms. Jakoby admits that she saw these warning signs in 1987, more than six years prior to the filing of her complaint in this matter. Ms. Jakoby has not alleged that the Government ever made a secret of the fact that the YPG was being actively used for testing military explosives and other munitions.

was denied safe and reasonable access to her property and thus constructively denied all access.

As proof of the land-mine testing, Ms. Jakoby offers the affidavit of Katherine McGeehon , a retired public employee of California whose connection to this case is unclear. The Government correctly points out that Mrs. McGeehon's testimony does not indicate any actual knowledge of the tests. Rather she refers only to hearsay statements allegedly made to her by a physicist who helped conduct the tests. Accordingly Ms. McGeehon's affidavit is of limited value.

In any event, the Government, in its reply brief, admits to the testing of land-mines at the YPG in 1991. The Government offers the affidavits of Richard Albert, Test Director and Project Engineer for YPG and Eusebio Lopez, a mechanical engineer at YPG, both of whom allege personal knowledge of the land-mine tests to which Ms. Jakoby apparently refers. These affidavits indicate that the tests were conducted with unfused mines and in locations remote from Ms. Jakoby's property. Thus, the Government argues , there was never any danger to Ms. Jakoby and no corresponding need to notify her of the test details. The affidavits indicate that even though one test was conducted "at least" one mile from Cibola Lake Road, there was no danger to civilian traffic on that road and thus the road was not closed. Mr. Lopez states that he has personal knowledge that civilians did in fact use Cibola Lake Road concurrently with the testing activities. The affidavits indicate that the only other land-mine testing in 1991 occurred at least thirty miles from Ms. Jakoby's mining claims.

[6] In further response to the Government's affidavits, Ms. Jakoby has offered a video taped interview of Donald M. Burt, a Professor of Geology at Arizona State University. The Government objects to this video tape because Professor Burt's statements are not made under oath and under penalty of perjury. The court agrees that the

plaintiff's submission does not comply with Appendix H and Rule 56(f) of the Rules of the Court of Federal Claims. Accordingly, plaintiff's motion for leave to file the video tape is denied. The court notes, however, that even if it were to accept the video-taped interview of Professor Burt, there is no indication in that interview that Ms. Jakoby was ever physically denied access to her property because of the land-mine testing at the YPG. Although Professor Burt points out that a possible route to plaintiff's property "might" have taken her into, or at least close to, the land-mine field, his statements do not indicate that she was denied full access to her property. Professor Burt admits that he has not been to the property at issue, or attempted to access the property, since 1976.

Ms. Jakoby argues that her lack of information translated to a rational fear of entry onto the YPG.*6 . This lack of information, she asserts, made it reasonable to assume that she could not cross the YPG off-road to gain access to her property. However, Ms. Jakoby does not allege that she ever asked the Government about the land-mine tests prior to initiating her suit in this court. Indeed, she admits that the Government repeatedly assured her that she had full right of access to her mining claims. Despite these admitted assurances, Ms. Jakoby informs the court that she chose not to believe the Government. Such a choice did not , however, place a burden upon the Government to take additional steps to satisfy Ms. Jakoby. Absent an actual danger to civilian traffic, the Government was under no obligation to inform Ms. Jakoby of its testing activities. She could, at any time, have asked the Government whether its land-mine testing posed any danger to her entry upon

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6. Ms. Jakoby maintains that she learned of the 1991 land-mine testing from an unnamed physicist who was working on the project, but who had become ill. This physicist allegedly informed Ms. Jakoby that such testing was taking place, but did not know the exact location or whether the mines had been removed.

the YPG for purposes of accessing her mining claims. She did not, and thus cannot now complain that her fear of crossing into the land-mine test was reasonable.

[7] The Government has provided unrefuted evidence that it has not imposed any restrictions on Ms. Jakoby's right to use and access her property within the six years prior to the filing of her claim. The plaintiff has not offered evidence that the Government's land-mine testing in 1991 blocked all access to her mining claims at issue. The evidence is that the plaintiff may enter her property at any time without authorization from Governmental authorities at the YPG, and may utilize trucks and explosives to develop her claims. Accordingly, the court finds that no compensable taking occurred.

Conclusion

The plaintiff's June 2, 1997 motion for "leave of court to file video tape proffer of expert witness' examination of new corroborative evidence given to plaintiff by government May 1, 1997-a map from government with penciled area of land mines-a genuine issue of material fact" is denied. In addition, the court holds that there are no genuine issues of material fact barring entry of judgment for defendant. The plaintiff's first claimed basis for a taking action, that there is not an adequate road to access her property, is untimely because it first accrued, if at all, sometime prior to April 22, 1990. The failure of the Government to inform the plaintiff about the 1991 land-mine tests did not amount to a compensable taking because there is no evidence that the land-mines were a physical barrier to plaintiff's access to her property. Plaintiff's motion for declaratory judgment is denied. The clerk is directed to dismiss the complaint. No costs.

"s/ Eric Bruggink"

Eric G. Bruggink
Judge

NOTE: Pursuant to Fed. Cir. R 47.6 this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

97-5108

RUTH KERR JAKOBY,

Plaintiff-Appellant,

v.

UNITED STATES

Defendant-Apellee

ON MOTION

Before BRYSON, Circuit Judge

ORDER

Ruth Kerr Jakoby moves for leave to file with this court a videotape which was returned to her by the Court of Federal Claims. The United States opposes. Jakoby moves for leave to file a reply, with reply attached. Jakoby moves for leave to file certain maps which were before the Court of Federal Claims, which she recently altered. In her motion, she requests certain discovery from the United States. The United States opposes. Jakoby moves for leave to file her appendix seven days after she files her reply brief.

Jakoby sued the United States in the Court of Federal Claims. The Court of Federal Claims granted summary judgment for the United States. According to the parties, the trial court denied Jakoby's motion for leave to file a videotape proffer of an expert witness's examination of evidence. In view thereof, Jakoby may submit the videotape to this court for the limited purpose of supporting an argument that the trial court committed reversible error in excluding the videotape. The clerk will maintain custody of the videotape so that the merits panel has access to the tape, if it wishes.

Jakoby's motion for leave to file altered maps is denied. The maps, as presented to the Court of Federal Claims, may be included in the appendix.

Accordingly,

IT IS ORDERED THAT:

(1) Jakoby's motion for leave to file a videotape is granted.

(2) Jakoby's motion for leave to file a reply is granted.

(3) Jakoby's motion for leave to file altered maps is denied.

(4) Jakoby's request for discovery is denied.

(5) Jakoby's motion for leave to file her appendix seven days after she files her reply brief is granted. Jakoby is cautioned, however, not to include any documents that were not before the trial court.

(6) Copies of this order will be transmitted to the merits panel assigned to decide this case.

December 17, 1997
Date

"s/ William C. Bryson"
William C. Bryson
Circuit Judge

cc : Ruth Kerr Jakoby
J. Carol Williams, Esq.

Filed U.S.Court of Appeals
for the Federal Circuit
December 18., 1997
Jan Horbaly
Clerk

s8

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

97-5108

RUTH KERR JAKOBY,

Appellant,

v.

UNITED STATES

Appellee.

DECIDED: FEBRUARY 18, 1998

Before RICH, SCHALL and GAJARSA, Circuit Judges

PER CURIAM

Ruth Kerr Jakoby (Jakoby) appeals from the decision of the United States Court of Federal Claims in 96-CV-216 of 23 June 1997 that dismissed her complaint. We affirm.

This is a case under the Fifth Amendment to the United States Constitution claiming just compensation for an alleged taking by the United States Government (Government). Jakoby owns at least a portion of certain patented mining claims (mine patents) that are wholly located within the boundaries of the Yuma Proving Ground (YPG), which is a Government military munitions testing facility. Jakoby acquired her interest in the mine patents in 19 75. Various comdemnation and voluntary leases existed between Jakoby and the government, but all these leases had terminated by 1985. On April 22, 1996, Jakoby brought this action claiming the Government took her property interest in the mine patents by (1) failing to maintain adequate road access to the mine across YPG, and (2) by conducting land-mine tests in certain off-road areas of YPG in 1991.

The Government moved to dismiss the complaint arguing that (1) the bulk of Jakoby claims regarding access were barred by the applicable six year statute of limitations (28 U.S.C. 2501) since the various restrictions on access arose well before 22 April 1990--they either existed at the time Jakoby acquired the property interest or they arose at some time during the leases that had expired by 1985; and (2) Jakoby failed to allege sufficient facts to show that the 1991 land-mine tests effectively prevented access to the mine patents. After further briefing and oral argument, the court denied the Government's motion to dismiss without prejudice but allowed the Government to file a motion for summary judgment. The Government so moved, and Jakoby opposed and cross-moved for a declaratory judgment. 1 After briefing was completed, the court denied Jakoby's motion for a declaratory judgment and dismissed the complaint.

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1 It appears that the allegations regarding the 1991 land-mine tests may not have been presented until this cross motion was filed and that Jakoby never amended her complaint to include these allegations.

On appeal, we treat this dismissal as a grant of the Government's motion for summary judgment. On appeal, Jakoby raises no issue of law or fact that was not expressly and adequately addressed in the well reasoned opinion of the trial court. The arguments Jakoby raises regarding the statute of limitations are greatly inapposite. The six year statute of limitations applies to her claim and is not tolled. See Hopland Band of Pomo Indians v. United States, 855, F 2d 1573, 1576-77 (Fed Cir. 1988) (six-year statute of limitations is a jurisdictional requirement and "must be strictly construed"). In addition, Jakoby's arguments regarding the effect of the land mine tests are insufficient to support her taking claim. When faced with a defendant's summary judgment motion, a plaintiff is not relieved of its own burden of offering admissible evidence that if believed would support a verdict, for the mere existence of some allegations of factual dispute will not defeat an otherwise properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 108 S. Ct. 2505 (1986). Therefore, we are not persuaded to disturb the reasoning of the trial court, and we affirm the decision of the court for the reasons set forth therein.

UNITED STATES CONSTITUTION (Extracts)

FIFTH AMENDMENT

No person shall....nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the acused shall enjoy the right to a speedy and public trial, by an impartial jury...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

SEVENTH AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

NINTH AMENDMENT

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.